No. 535.

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United States Supreme Court.

OCTOBER TERM, 1900.

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IN RE THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Brief of the City of New Orleans in opposition to the petition of the American Sugar Refining Company for Writ of Certiorari; or, in the alternative, for Writ of Mandamus.

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STATEMENT OF THE CASE.

This suit was brought by the City of New Orleans in the Civil District Court of the Parish of Orleans against the American Sugar Refining Company, a citizen of New Jersey, to recover the

sum of Six Thousand Two Hundred and Fifty Dollars ($6250), claimed to be due to the city by the defendant for a license for the privilege of carrying on its business in the City of New Orleans under the laws of the State of Louisiana. The suit was removed to the United States Circuit Court of the Eastern District of Louisiana on the petition of the defendant showing the diverse citizenship of the parties.

After the case was removed, defendant filed an answer, setting up two defenses: First, that it was exempt from license taxation by Article 229 of the Constitution of the State of Louisiana, adopted in 1898, and second, that Ordinance 14,884, C. S., of the City of New Orleans, which levied the license sought to be recovered, and which was based on Act 171 of the General Assembly of Louisiana for 1898, was in contravention of the Fourteenth Amendment of the Constitution of the United States.

Upon trial of the case there was judgment for plaintiff, and defendant applied for and obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to review said judgment. The Court of Appeals subsequently dismissed the writ of error upon the ground that the constitutional question was controlling and that it would not take jurisdiction of the case involving, as it did, such an issue. 104 Fed. Rep. p. 2.

Thereupon, the American Sugar Refining Company filed its petition in this court for a writ of *Certiorari;* or, in the alternative, for a writ of *Mandamus,* to the judges of the United States Circuit Court of Appeals of the Fifth Circuit, to compel them to entertain the writ of error heretofore dismissed by them.

Argument.

We will first address ourselves to a discussion of the prayer for a *mandamus.* We take it as an elementary proposition, needing no authorities or argument to support it, that a *mandamus* will not lie from an appellate court to an inferior tribunal to control judicial discretion, except when abused. There is no question of abuse in the instant case and the general proposition may

be stated accordingly that a superior court will not interfere by *mandamus* with the discretion of an inferior court. That proposition being once admitted, petitioner's prayer for a *mandamus* is without colorable support, for it is perfectly clear that under the Act of March 3rd, 1891, creating the Court of Appeals, and the interpretation repeatedly put upon that Act by this Court, it was entirely discretionary with the Circuit Court of Appeals for the Fifth Circuit whether it would take jurisdiction of the instant cause or not. It was a case in which it was distinctly alleged that a State's statute was in contravention of the Constitution of the United States. Therefore, it was essentially a case in which that court had the option of declining jurisdiction, if it so saw fit.

For it was expressly decided, in *Carter vs. Roberts,* 177 *U. S., p.* 500, that "when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this (Supreme) Court, and if such cases are carried to the Circuit Court of Appeals, those courts *may decline to take jurisdiction,* or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance."

This method of procedure was approved in terms in case of *R. R. Co. vs. Thiebaud, in* 177 *U. S.,* 615, which was a case where the statute of a State was claimed to be in contravention of the Constitution of the United States, as in the instant case. The three alternatives thus given the Court of Appeals were again recognized in the case of *Pike's Peak Power Co. vs. City of Colorado Springs, Fed. Rep., vol.* 105, *p.* 1, in which case the Court of Appeals for the Eighth Circuit chose to take jurisdiction and decided the whole case. As has been stated, the Circuit Court of Appeals for the Fifth Circuit in the present suit chose the first of the three alternatives permitted to them. It declined to take jurisdiction and dismissed the writ of eror. It is therefore clear that the court acted within the discretion granted it by the Act of March 3, 1891, and the interpretation put upon that Act by this

court, and we respectfully submit that to ask this court for a writ of *mandamus* to compel the Court of Appeals to hear a case which it had the discretion of declining to hear, would be a grave departure from all the purposes for which the writ of *mandamus* has ever been exercised by this court.

But petitioner urges that even though there be a constitutional question involved in the case, yet as the jurisdiction of the Circuit Court originally attached through diversity of citizenship of the parties, therefore the writ of error should have been sued out in the Circuit Court of Appeals and not in the Supreme Court. His contention is that where the constitutional question is only raised by way of defense, a writ of error or appeal, as the case may be, will not lie direct from the Circuit Court to the Supreme Court. But the fallacy of his position is conclusively shown by the decision in the case of *Louis Loeb, Plaintiff in Error, vs. the Trustees of Columbia Township, Hamilton County, Ohio, No.* 42, *October Term,* 1900, recently decided in this court. There, as in the case at bar, the jurisdiction of the Circuit Court arose from the diversity of citizenship. The defendant invoked the constitutional question by way of demurrer and not with the particularity invoked by the defendant's answer in this case. There was an appeal to the Supreme Court direct from the Circuit Court, which was met by a motion to dismiss, on the ground of want of jurisdiction. This court, through Justice Harlan, decided that, however the constitutional question arose, the fact that it was an issue in the case was sufficient to vest jurisdiction in the Supreme Court of the United States under section 5 of 26 Stat., 826 and 827, 8 (Act of March 3, 1891), which says that appeals or writs of error may be prosecuted to the Supreme Court *"in any case* in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The decision is instructive in another respect. The doctrine is there recognized also that if a party elects to invoke the jurisdiction of the Court of Appeals in spite of the existence of a constitutional question in the case, he must abide by its decision. In

other words, if that court decline jurisdiction, he cannot ask a superior tribunal to compel it to grant him a hearing, and likewise if the Court of Appeals take jurisdiction and render a final judgment upon the writ of error, he cannot thereafter invoke the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court.

When the writ of error in the instant case was sued out in the Circuit Court of Appeals, petitioner took the chances of having that court decline jurisdiction. That contingency having arisen, it cannot seek to compel the court to hear a case which it knew the court had an option of declining to entertain.

We do not conceive such to be the purpose of the writ of *mandamus,* and respectfully pray that petitioner be denied leave to file its application for same.

The prayer for *certiorari* is based on two grounds: First, it is urged that if the Circuit Court of Appeals were justified in dismissing petitioner's writ of error, yet "an unbroken line of authorities" cited in the brief justified the action of petitioner in suing out the writ of error at that time from the Court of Appeals, as the cases of *Carter vs. Roberts* and *R. R. Co. vs. Thiebaud* had not then been decided.

Petitioner implies that there has been a variation in the attitude of the Supreme Court of the United States on the subject, for which it should not be made to suffer. With due deference to the learned counsel, we submit that it is evident that he has misread the Statute of March 3, 1891, confused sections 5 and 6 thereof, and misapplied the interpretation of this Act contained in the decisions of this court, which he has quoted so elaborately in his brief. Section 5 of March 3, 1891, as said in the Loeb case, *supra,* gave the Supreme Court jurisdiction "*in any case* in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." The wording of the statute, in so far as this clause is concerned, has never been altered since the passage of the Act, and it is susceptible of no

doubtful meaning. No other inference can be drawn than that the Supreme Court is seized of jurisdiction in such cases.

The jurisprudence on the subject is as unmistakable in its meaning as is the statute, and not one of the decisions in "the unbroken line of authorities," to which petitioner refers in its brief, bears out its contention that under the jurisprudence as it existed up to the Carter case the Supreme Court would not have take cognizance of a writ of error in the instant case, involving, as it did, the constitutional question, unless that question appeared in plaintiff's statement of its own case in its original bill or declaration. This fact is made clear by examination of *Turck's case,* 150 *U. S., p.* 138 ; *Borgmeyer vs. Idler,* 159 *U. S.* 408 ;*Ex Parte Jones,* 164 *U. S.* 691 ;*Third St. Ry. Co. vs. Lewis,* 173 *U. S.* 460, which were leading cases relied upon by petitioner as having induced it to sue out the writ of error from the Circuit Court of Appeals instead of the Supreme Court. These cases are in nowise at variance with the Carter and Thiebaud cases, and indeed are perfectly consistent and reconcileable therewith, as shown in the Loeb case, cited above.

Petitioner's error seems to lie in its confusion of cases arising under Section 5 of the Act of March 3, 1891, and those arising under Section 6 of the same Act. It is perfectly true, as contended by it, that this court in cases above cited has repeatedly declared that in cases arising under Section 6, this court will not entertain appeals or writs of error from the Circuit Court of Appeals unless a constitutional question appear affirmatively in plaintiff's declaration. Such a procedure is in entire harmony with the provisions of Section 6, which is intended to apply to cases where the jurisdiction of the Circuit Court arises from the diverse citizenship of the parties, and in which the judgment of the Circuit Court of Appeals is final, but in no case has it ever been held by this court as a condition precedent to hearing an appeal or writ of error direct from the Circuit Court involving a constitutional question that this question had to appear in plaintiff's petition. Such a case is covered by Section 5, and the rules

laid down by this court in Turck's case and others, which arose under Section 6, have no application in fixing the appellate jurisdiction of this court.

As was said in the Loeb case, a very great difference exists between cases in which the appeal is from the Circuit Court to the Supreme Court direct, and those in which a final judgment has been rendered in the Circuit Court of Appeals before the jurisdiction of the Supreme Court is invoked. For instance, suppose the Court of Appeals had taken jurisdiction and decided the present case, and either party had sued out a writ of error from the Supreme Court to the Court of Appeals, then would a similar case to Turck's case have been presented. Petitioner, or the city, might then urge with conclusive force the objection that the jurisdiction of the Circuit Court arose solely from the citizenship of the parties, the constitutional question did not appear in plaintiff's petition, and under the 6th section the decision of the Court of Appeals was final. This court would then hold that, as the Court of Appeals had heard and decided the whole case, and none of the unusual features justifying the review by writ of error in cases arising under Section 6 were presented, the writ should be denied. But this suit is governed by the provisions of Section 5, and none of these decisions from Turck down to Ex Parte Jones referred even remotely to appeals or writs of error sued out under that section. Under Section 5 the Supreme Court is vested with direct appellate jurisdiction "in any case that involves the construction or application of the Constitution of the United States, or in any case in which the Constitution or law of the State is claimed to be in contravention with the Constitution of the United States." And indeed no more conspicuous example of a case arising under Section 5 could arise than the present one If petitioner in the face of this unequivocal declaration mistook the forum in which to seek relief and was unable to differentiate this case from a case like Turck's case, arising under Section 6, it cannot expect the writ of *certiorari* to come to its rescue in its extremity.

The other ground urged in support of the application for the writ of *certiorari* is that this cause involves "other and grave questions of law" in addition to the constitutional question.

"The other and grave questions" are whether a refiner of sugar is a "manufacturer" and as such exempt from license under the Constitution of Louisiana, Article 229 of 1898, and whether a Federal court will follow the decision of the highest court of Louisiana on that subject. We will not go into the discussion of the merits of the first proposition. The Supreme Court of Louisiana, in the suit of *State of Louisiana vs. American Sugar Refining Company,* the petitioner here, reported *in* 51*st La. Annual, p.* 562, in an elaborate and well considered opinion, held petitioner to be a *refiner,* and not a manufacturer of sugar, and as such liable to a license tax. That suit was brought under Act 150 of the Legislature for the year 1890, which is similar in its provisions to the city Ordinance 14,884, C. S., Sec. 15, under which the said license is sought to be enforced in the present suit. The exemption claimed by petitioner in suit against the State was claimed under Article 206 of the Constitution of Louisiana, 1879, which is identical in all respects with Article 229 of the Constitution of 1898, under which exemption is claimed in this case. Therefore, this suit involves the identical issues considered and decided in the case of the *State vs. American Sugar Refining Company.* The two suits are similar in all respects, and we are quite content to rest our views as to whether a sugar refiner is a manufacturer or not on the comprehensive and well reasoned opinion of the Supreme Court of Louisiana in that case. We therefore submit that the decision of the Circuit Court of the United States in this case is in accord with the decision of the Supreme Court of Louisiana in a similar case, and even if a writ of *certiorari* were to be granted, the decision of the Circuit Court would be affirmed by this court on consideration of the merits of the controversy.

But granting that the judgment of the Supreme Court of Louisiana, in question, did not meet with the approval of this

court, we respectfully submit that it would yet be binding upon it. As an expression of the highest court of a State in the matter of the construction of the organic law of the State, it would receive, under the well settled principle adopted by this court, the sanction of the Supreme Court of the United States. There was, as your Honors will recall, a writ of error sued out in this court to the Supreme Court of Louisiana in the case of *State of Louisiana vs. American Sugar Refining Company,* above referred to, and the question whether a refiner of sugar was a manufacturer became an issue there as here. Judge Brown, in denying the writ, used the following language: "It is scarcely necessary to say that the question whether the defendant were a manufacturer within the meaning of the Louisiana Constitution is one dependent upon the construction of that Constitution and that the interpretation given to it by the State Supreme Court, raising as it does no question of contract, is obligatory upon this court."

"American Sugar Refining Company, Plaintiff in Error, vs. The State of Louisiana *et al.*" on writ of error to the Supreme Court of Louisiana, No. 38, October term, 1900. Should, therefore, your Honors grant the writ of *certiorari,* it would in no way operate to the advantage of petitioner, but would prove a vain and idle ceremony. This court has already said it would follow the decision of the Supreme Court of Louisiana in the premises, and the Supreme Court of Louisiana has decided adversely to the contention of petitioner.

We, therefore, respectfully submit that there is nothing in the instant case to make necessary or proper the exercise of the discretionary power lodged in this court to grant writs of *certiorari.*

SAMUEL L. GILMORE,

City Attorney for City of New Orleans.